

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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RUTH SMITH, : Civil Action No.:
 : 1:22-cv-81
Plaintiff, :
versus : Thursday, December 22, 2022
 :
SUNPATH, LTD., :
 :
Defendant. :
-----X

The above-entitled motion to strike was heard before
the Honorable Leonie M. Brinkema, United States District
Judge. This proceeding commenced at 9:59 a.m.

A P P E A R A N C E S:

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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1 All right. I've looked at your papers, and I
2 understand your argument. But what I want to know is, why
3 did it take you so long to subpoena, and I'm going to call
4 that entity American? You took three weeks from the time
5 the Rule 16 order was issued to the issuance of the
6 subpoena. And, you know, in this court where the docket
7 moves so quickly, three weeks is a long chunk of time.

8 Why did it take you that long to issue the
9 subpoena?

10 MR. SMITH: Well, Your Honor, I believe we issued
11 the subpoena shortly after holding the Rule 26(f)
12 conference, which you have to hold prior to conducting
13 discovery.

14 What I would point out is, this isn't a case where
15 plaintiff, you know, sat on their hands and didn't do
16 anything and failed to meet a deadline. This is a case
17 where we did move quickly. We served discovery, we served
18 subpoenas quickly after the Rule 26(f) conference, and we
19 moved as quickly as we could to depose American Protection,
20 SunPath's third-party marketer that placed the calls at
21 issue.

22 We couldn't depose American Protection until
23 November 1st, and when we finally attended the deposition,
24 American Protection cut the deposition short by just
25 quitting halfway through, and, thereafter, we worked as

1 quickly as we could with American Protection's counsel. We
2 were frustrated, but we got them to agree to return for --
3 to finish the deposition on November 9th. It was on
4 November 9th that American Protection actually identified
5 the calling system that they used to place the call, despite
6 the fact that we requested that information in the initial
7 subpoena, and it was never produced.

8 So, hours later, after learning it was Five9 -- it
9 was Five9 they used to place the calls, we issued a
10 subpoena, you know, that same day for the call records. The
11 Five9 --

12 THE COURT: Yeah. The problem you have, though,
13 is that in this district, you have to move a lot faster than
14 what you did, and local counsel should have been, you know,
15 explaining that to you.

16 If you have a recalcitrant witness, you can't just
17 back in the weeds and play, you know, with that witness's
18 schedule. You need to protect yourself by immediately
19 requesting assistance from the Court to get that person or
20 that entity to respond more promptly, especially in a case
21 where you're thinking of going for class certification.

22 I don't find that there has been sufficient
23 diligence in complying with the rules. I am not at all
24 impressed with the argument that somehow Judge Fitzpatrick
25 blessed this extension. He was clear when you did appear

1 before him to try to get all the deadlines extended. That
2 was denied. Your citation to his comments that might have
3 suggested that he assumed that the motion for class
4 certification would be coming later does not impress me.
5 The orders that he signed are pretty clear. There were set
6 deadlines; those deadlines were not met. Without even
7 requesting leave of court to file late, you went ahead and
8 filed this motion for class certification a month late.

9 Now, I do find, frankly, for the record, that
10 there's certainly no prejudice to the plaintiff, because you
11 have one named plaintiff, Ruth Smith, and her case is set to
12 go to trial February 15. Unless the case is resolved on
13 pretrial motions, she's going to have her day in court in
14 less than two months. And, obviously, if she were to
15 prevail, you will then have a very clear picture of the
16 evidence and also of the law that applies to this case, and
17 I don't see anything that prevents you or anybody else from
18 filing another action against this defendant.

19 So I'm granting the motion to strike the motion
20 for class certification without prejudice. I'm not making a
21 finding that this case would not be otherwise eligible for
22 class certification, but I'm just finding that the way it
23 was done broke the scheduling order of the Court without
24 good reason. And so this is not a finding on the merits, so
25 it still leaves the defendant vulnerable to a class action

1 down the road if, after all the evidence is developed, it is
2 clear that the defendant should be responsible for these
3 calls.

4 Again, there's some significant legal issues in
5 this case, and I guess factual issues as well, because I
6 think it is uncontested that all of the calls at issue were
7 made by a third party who's not a named party in this case.
8 And, as I recall early on in the case when I required
9 SunPath to provide the contracts that it had with these
10 third parties, one of which was American, there was
11 significant disclaimer-type language. And so there's going
12 to be some interesting issues coming down the road in the
13 motions that I expect we'll see, and/or the trial.

14 But that is my ruling. The order will reflect
15 that this is not made on a merits basis so that it's not
16 with prejudice. Thank you for calling in. You're all free
17 to go.

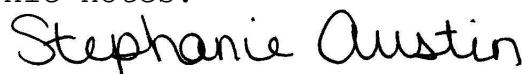
18 MR. CAFFAS: Thank you, Your Honor.

19 MR. DRISCOLL: Thank you, Your Honor.

20 MR. SMITH: Thank you, Your Honor.

21 (Proceedings adjourned at 10:06 a.m.)

22 I certify that the foregoing is a true and accurate
23 transcription of my stenographic notes.

24 

25 Stephanie M. Austin, RPR, CRR